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Supreme Court of the United States

October Term, 1973

No. .....

THE GENERAL TIRE AND RUBBER COMPANY,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the District of Columbia Circuit

The General Tire and Rubber Company petitions the Court to issue its writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment entered by that court in Cause No. 72-2214 on its docket, and in support thereof says:

OPINIONS BELOW

There were no opinions below. The Court of Appeals (Judges McGowan, Tamm, and Leventhal) without opinion, affirmed a summary judgment also entered without opinion, by Judge Joseph C. Waddy in the United States District Court for the District of Columbia Circuit.

JURISDICTION

The judgment sought to be reviewed is dated, and was entered, December 14, 1973. This Court has jurisdiction to review pursuant to 28 U.S.C. 1254(1) and 2101(c).

QUESTIONS PRESENTED

This case brings to the Court these questions:

I. Whether a Regulation applying an important statute, the National Traffic and Motor Vehicle Safety Act, to manufacturers of automotive equipment can be stretched administratively to cover work done by retailers of automobile tires after the manufacturing process has been completed.

II. Whether a Regulation, that the statute requires to be reasonable, practicable, appropriate, and contribute to safety, can stand when its effect is to drive out of business small operators who perform a service that contributes to motoring safety.

III. Whether due process requires a court that construes an important statute to state its reasons for the construction it puts on the statute.

CONSTITUTION, STATUTE, REGULATIONS

The constitutional, statutory, and regulation provisions relevant to this case, with the here relevant portions thereof italicized, are:

Constitution

5th Amendment:

"No person shall * * * be deprived of * * * property, without due process of law * * *."

Statute

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, et seq.:

§ 1381. *Congressional declaration of purpose*

Congress hereby declares that the purpose of this chapter is to *reduce traffic accidents* and deaths and injuries to persons resulting from traffic accidents. * * *. Pub.L. 89-563, § 1, Sept. 9, 1966, 80 Stat. 718.

§ 1391. *Definitions*

As used in this subchapter—

* * *

(2) "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, *which is practicable*, which meets the need for motor vehicle safety and which provides objective criteria.

* * *

Pub.L. 89-563, Title I, § 102, Sept. 9, 1966, 80 Stat. 718, amended Pub.L. 91-265, § 2, May 22, 1970, 84 Stat. 262.

§ 1392. *Motor vehicle safety standards—Establishment*

(a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard *shall be*

practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

* * *

(f) In prescribing standards under this section, the Secretary shall

* * *

(3) consider whether any such proposed standard *is reasonable, practicable* and *appropriate* for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

* * *

Pub.L. 89-563, Title I, § 103, Sept. 9, 1966, 80 Stat. 719.

§ 1397. *Prohibition against manufacture, sale, delivery, or importation of substandard vehicles—Access to records; certificate; notification of defect*

* * *

(b) (1) Paragraph (1) of subsection (a) of this section *shall not apply to* the sale, the offer for sale, or the introduction or delivery for introduction in interstate commerce of any motor vehicle or motor vehicle *equipment after the first purchase* of it in good faith for purposes other than resale. * * *"

Pub.L. 89-563, Title I, § 108, Sept. 9, 1966, 80 Stat. 722.

Regulations

Standard 109

"MOTOR VEHICLE SAFETY STANDARD NO. 109
NEW PNEUMATIC TIRES—PASSENGER CARS

S1. *Purpose and scope.* This standard specifies tire dimensions and laboratory test requirements for bead unseating resistance, strength, endurance and high speed performance; defines tire load ratings; specifies labeling requirements * * *."

S2. *Application.* This standard applies to new pneumatic tires for use on passenger cars manufactured after 1948.

* * *

S4.2 *Performance Requirements.*

S4.2.1. *General.* Except as provided in S6, each tire shall conform to each of the following:

* * *

S4.2.2. *Test requirements.*

* * *

S4.3. *Labeling requirements.* Except as provided in S4.3.1, each tire shall be conspicuously labelled on both sidewalls with each of the following permanently molded into or onto the tire:

* * *

(i) An approved recital (or the symbol specified in Figure 1) that the tire conforms to applicable Federal Motor Vehicle Safety Standards."

49 CFR 211.1 at 571.21 (pp. 338-358—all engineering details of test requirements here omitted).

STATEMENT OF CASE

In 1966 the United States Government entered the field of regulation of motor vehicle safety by passage of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 1381, et seq.) and thereafter pursuant to 15 U.S.C. 1392 issued a regulation known as Standard 109 (49 CFR 571-21) governing new passenger car tires.

In 1968, petitioner, The General Tire and Rubber Company, manufactured in its Mayfield, Kentucky plant the 8 new passenger car tires here in question, testing them (not these particular 8 tires but others of the same class) against the test requirements of Standard 109, and certifying and labelling each as complying with Standard 109, all as required by the Act. The 8 tires were shipped to a retail store in Philadelphia, Pennsylvania.

This retail store, like many retail stores including gasoline stations and the like, offered for sale to the motoring public not only tires but a variety of other items including services to complement the purchased tire, such as a wheel balancing service, a snow tire studding service, and a microsiping service, which services utilized specialized machinery purchased by the retail store from others.

Comment: Microsiping is a process of slicing a series of parallel cuts diagonally across the ribs of the tread of a completely manufactured ready-to-use tire, whether new or used, to a depth less than the groove between the ribs (*microsiping cannot be performed during the tire manufacturing process* due to the molding process by which tires are built). The theory of the proponents of microsiping is that it produces a tire having the capability of improved performance by giving the tire greater

traction for stopping, the slices opening up and permitting the sections of tread between slices to act as little feet with the slice space itself allowing for greater heat dissipation, and preventing hydroplaning on a wet surface. The merit of microsiping is not challenged by the Government. Microsiping a tire is accomplished by mounting the tire on a wheel, inflating it, and then locking the inflated tire-on-wheel in a special machine whose knives slice in the grooves to pre-set depths and angles. No tread material is destroyed or removed in the process. In the words and pictures of the proponents' advertising brochures:

MICRO-SIPED TIRE

Although not all distinguishable the cuts are there . . . almost ¼" deep. These cuts resemble the slices of a loaf of bread within its cellophane wrapping with siped or sliced edges adjoining each other.

In the particular retail store in question, the microsiping machine was located on the ground floor in sight of the customers with the following display sign advertising the microsiping service:

If a customer who had purchased a tire from one of the store's *sales* department employees wanted to avail himself of such an ancillary service, he simply ordered same whereupon one of the store's *service* department employees trained in microsiping would mount the tire on the microsiping machine and cut the microsiping grooves in the tread of the tire, thus microsiping the customer's tire while the customer waited. If a customer brought into the store his own new or used tire, he could order and obtain the same miscrosiping service thereon for the same $4 charge per tire.

On November 8, 1968, a Government agent entered this retail store, selected the 8 tires here in question from an inventory of tires up in a loft, had these 8 tires taken to the ground floor, inspected the store's microsiping machine, ordered the store to perform the service of microsiping upon each tire, paying the standard service charge of $4 per tire for such service, although paying a Government discount price for the tires themselves.

Later on, the Government had these 8 microsiped tires tested by a testing laboratory against the requirements of Standard 109. When 4 reportedly failed the test (General Tire's later examination revealed that only 1 had failed the test, and that failure was unrelated to microsiping), the Government sued General Tire in a civil action in the United States District Court for the District of Columbia for violation of the Act, claiming (for the first time) that the microsiping service *is part of the manufacturing process* thus requiring the manufacturer to retest new passenger car tires against Standard 109 after microsiping with recertification that the tires so microsiped comply with Standard 109.

Comment: The particular retail store singled out by the Government for its purchase of tires and the microsiping service was no ordinary retail store. It was a retial store owned by a manufacturer of tires (this petitioner), deliberately selected to fit the Government's pre-conceived theory that the microsiping service *is part of the manufacturing process.* By pre-trial discovery, General Tire learned that the Government had in its possession documents covering its motivation for this particular test-of-microsiping venture. The Government refused to produce the documents, claiming Administrative privilege. General Tire's motion to compel production was overruled by the District Court.

In the firm belief that microsiping, and all such retail store services, are *not* part of the manufacturing process and were never regulated by the Government (or ever attempted to be so regulated until the case at bar), General Tire resisted the Government's claims in the District Court and in the United States Court of Appeals—all to no avail and without a single word of opinion to explain the error, if any, in that belief. General Tire continues to so believe and to so resist, turning finally to this Court of last resort—as its last hope for vindication and relief.

REASONS FOR GRANT OF WRIT

The writ should be granted because:

I. The attempted extension of Standard 109 to the retail service of microsiping violates the statute and is in conflict with standards for the construction of statutes and Regulations adjudged in other cases.

The Act requires that every Standard must be "practicable," must "meet the need for motor vehicle safety" (§ 1391(2)), and must be "reasonable, practicable and appropriate * * * and * * * contribute to carrying out the purposes of * * * [the Act]" (§ 1392(f)-(3)(4)). To meet these requirements each regulation must meet the realities of the market place:

> "The House debate on its proposed safety bill suggests that by 'practicable' the legislators meant that all relevant factors be considered by the agency, 'including technological ability to achieve the goal of a particular standard as well as consideration of eco-

nomic factors.' 112 Cong. Rec. 19648 (Aug. 17, 1966). The Report of the Senate Commerce Committee recommending passage of the Senate's version of the safety act, which was the basis for the version ultimately enacted, stated: 'The committee recognizes . . . that the Secretary will necessarily consider [in the issuance of standards] *reasonableness of cost, feasibility* and adequate lead time.' 2 U.S. Code Cong. & Adm. News, 89th Cong., 2d Sess., 1966, p. 2714."[1]

H & H Tire Company v. U.S. Dept. of Transportation, (12/5/72, 7th Cir. Ct. of Appeals) 471 F.2d 350 at p. 353.

In *Bowles v. Seminole Rock Co.,* (1945) 325 U.S. 410, quoted in *Udall v. Tallman,* (1965) 380 U.S. 1, 16, this Court said:

> "The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes controlling weight *unless it is plainly erroneous or inconsistent with the regulation.*" 325 U.S. at 414.

In *Abbott Laboratories v. Celebrezze,* (D. Del. 1964) 228 F. Supp. 855 (rev'd on other grounds, 352 F.2d 286 which reversal was itself rev'd on other grounds and remanded, 387 U.S. 136), the courts refused to allow a Government agency to extend its regulations beyond the scope of the statutory authority for which regulations where the agency had "interpreted the language of Congress with a broad sweep." 228 F. Supp. at 864.

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1. Emphasis supplied throughout.

And in *H & H Tire Company v. U. S. Department of Transportation,* (7th Cir. 1972) 471 F.2d 350, the court voided the Government's attempt to extend Standard 109 to retreaded tires via Standard 117, largely because of the realities of the market place which would have eliminated the use of retreaded tires (just as microsiping will be eliminated by the attempted regulation in the case at bar), thus defeating the purpose of the Act—safety of the motoring public. Judge Stevens in his concurring opinion at 471 F.2d 356 said:

> "Respondent has determined that the third alternative (to replace them with retreads) may not be selected unless the retread will last as long and perform just as well as a new tire. If that determination is enforced, the cost of retreads will increase and inevitably some car owners will reject the third alternative. * * * Thus, among the predictable effects of the enforcement of Standard 117 are the following: (1) some people will be driving on less safe tires; (2) some people will buy more expensive tires than they really need; and (3) since fewer retreads will be sold, new tire manufacturers will have less vigorous competition to face. In short, there is a cost to society at large associated with the enforcement of Standard 117."

II. The construction put on the statutes and regulations will drive small operators out of business.

Since microsiping is a service never performed upon a tire (new or used) unless and until so requested by a purchaser of the tire for use (and not for resale), microsiping is purely a retail service performed solely at the retail level.

Retailers of tires constitute small economic units, ranging all the way from the local gasoline station to the somewhat larger tire store centers. An owner of such a retail store with, for example, an overall investment of $50,000 to $150,000 can afford to invest an additional $1,500 to $2,500 in the purchase of a microsiping machine (from its inventor and manufacturer) in the expectation that, at a service charge of $4 per tire, it will soon pay for itself and begin to earn a profit for the retailer. The same is true of other ancillary services such as studding snow tires, balancing tires on wheels, aligning car wheels, etc. However, few retailers could afford the heavy investment required for a testing laboratory to retest Standard 109 new passenger car tires (previously tested by the manufacturer) after microsiping. The imposition of such a requirement would drive the retailer out of the microsiping service business entirely, forcing him to scrap his microsiping machine.

Comment: Nor could the retailer resort to an independent testing laboratory. If the customer desires microsiping, he can have it performed on his tires by the retailer in a few minutes while he waits, at the cost of $4 per tire. To ask the customer to wait a week or more while the retailer sends the tires (after microsiping) to a testing laboratory and to pay the extra cost of such test ($100 a tire) would "kill-off" all such sales then and there.

During oral argument in the Court of Appeals, the Government called attention to its latest attempt to extend Standard 109 to the microsiping service (Fed. Reg., Vol. 38, No. 188, p. 27050, promulgated September 28, 1973, effective March 29, 1974), which says:

> "The position of the NHTSA is that microsiping should be treated similarly to any other manufacturing process."

This is engineering nonsense. Labelling the retail service of microsiping as "part of the manufacturing process" does not make it so. Nor does it convert a purely retail function into a manufacturing function. Nor do the judgments of the court below affirming that it is so, make it so. It is not so, it cannot be so: first, because it fails to meet the mandate of the statute (that the Regulation be "reasonable" and "practicable"), and, second, because it leads to the absurdity of converting a retailer (say, for example, a small independent tire dealer possessed of a single microsiping machine) into a "manufacturer" (which "reasonably" it is not) and imposing upon it the financially ruinous test requirement of Standard 109 (which "practically" it cannot meet). The effect of this is to toll the death knell of all microsiping to the detriment of the safety of the motoring public, hence thwarting the very purpose of the National Traffic and Motor Vehicle Safety Act of 1966.

III. Due process surely requires a court that construes an important statute to state its reasons for the construction it has given the statute.

Two courts and four judges in the case at bar ruled against petitioner without a single word of explanation to reveal wherein they found petitioner to be in the wrong, viz.:

> *District Court*: The Government's cross-motion for judgment granted; petitioner's cross-motion for summary judgment denied—without opinion.
>
> *Court of Appeals*: Judgment affirmed—without opinion.

Comment: In petitioner's own State of Ohio, the Supreme Court of Ohio now requires all Ohio Courts of Appeals to write opinions in all cases decided by them. Ohio Rules of Appellate Procedure, Rule 12(A).

The constitutional requirements of due process require no less of the Federal Courts. For authority we cite from Ohio's leading text on the subject,

OHIO APPELLATE PROCESS (Thomas V. Koykka, A.B., J.D., The W. H. Anderson Co., Cincinnati, Ohio 1972);

§ 4.04 *Court Must Support Decisions by Reasons*

Appellate Rule 12(A) proved to be the most controversial of all the Rules. It says:

> 'All errors assigned and briefed shall be passed upon by the court *in writing, stating the reasons* for the court's decision.'

This is an important and healthy change.

* * *

§ 4.06 *—Reasons That Support Rule*

If a litigant considers a claim of error serious enough to brief and argue, he is entitled to be told why his claim of error is rejected. On the other hand, if his claim is accepted, the opposing party is entitled to be told why it is accepted.

The compelling reason for requiring a court to say how and why it decides is stated by Anthony Lewis in *Gideon's Trumpet*,[1] page 214, as well as anywhere, in these words:

Section 4.06

1. Random House, New York, 1964.

'The search for principle is the essence of the judicial process * * *. Every decision should be supported by reasons that appeal to the intellect and to the ethical sense of Americans. The requirement that a court give reasons for its judgments is a basic safeguard * * *.'

This is particularly important in a period such as the present when, as every perceptive person knows, and as Karl N. Llewellyn has pointed out in *The Common Law Tradition*,[2] page 3, 'we face a crisis in confidence which packs danger.'

§ 4.07 —*Policy Considerations*

The requirement that the decision be supported by written reasons is supported by important policy considerations.

First, the written opinion supplies—

§ 4.08 — — (i) *Better assurance of correctness*

The obligation to state reasons produces its own assurance of the justness of the decision. Mr. Justice Jackson has certified that it is a common experience for a Justice to be assigned to write an opinion for the Court in accordance with a view he expressed in conference, 'only to find from more intensive study that it was mistaken."[1]

Judge Harold R. Medina, of the United States Court of Appeals for the Second Circuit, says, 'We have had that happen in our court again and again."[2]

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2. Little, Brown and Company, 1960.

Section 4.08

1. *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations* (1951), 37 American Bar Association Journal 801.

2. *The Decisional Process* (1962), 20 Bar Bulletin of the New York County Lawyers Association 94, 98.

Judge Samuel H. Sibley, of the United States Court of Appeals for the Fifth Circuit, similarly reports:

> 'A careful, reasoned opinion is a great aid to accuracy and correctness in decision. Many a decision has been modified or challenged in the course of preparing such an opinion.'[3]

The obligation to state reasons compels study; study may well change views initially held. In the words of Archibald King, for many years responsible for opinions of the Judge Advocate General's department, 'Writing an opinion compels research which otherwise might not be done, or so thoroughly done.'[4]

In short, as is noted in the *Columbia Law Review*:

> 'The way in which judges reach a decision—even the amount of time they spend in doing so—can and does affect the interests of litigants, perhaps as critically as do rules of substantive law.'[5]

A further important policy consideration supporting the requirement that the court give its reasons, is that—

§ 4.09 — — (ii) *Correction of error will be easier*

The reasons the court gives will make correction of the decision, if it be erroneous, easier. 'Opinions by the lower courts are * * * indispensable for the adequate exercise by the Supreme Court of its reviewing function. Without them * * * "the appel-

---

3. *The Multitude of Published Opinions*, 25 Journal of the American Judicature Society 166 (1942).

4. *The Number and Length of Judicial Opinions* (1949), 33 Journal of the American Judicature Society 108, 109.

5. *The Second Circuit: Federal Judicial Administration in Microcosm* (1963), 63 Columbia Law Review 874.

late court is denied an important aid in the consideration of the case; and the defeated party is often unable to determine whether the case presents a question worthy of consideration by the appellate court." [1]

Third, and perhaps most important, is this:

§ 4.10 — — (iii) *Reasons given are important in development of law*

The reasons given for a decision are important in the development of the law.[1] The decision affects only the litigants; the opinion will shape the rights of many others. Mr. Justice Cardozo put it this way:

> 'The court exists, not for the individual litigant, but for the indefinite body of litigants, whose causes are potentially involved in the specific cause at issue."[2]

Fourth, and also important—

§ 4.11 — — (iv) *Court should not only be right but appear to be right*

The court ought not only be right but, to the common man, appear to be right. 'The courts in general, and the appellate courts in particular, should not only be right, they should also be respected. They will not be respected unless they convince the readers of their opinions that, at least most of the time, they

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Section 4.09

1. Felix Frankfurter and James M. Landis, *The Supreme Court Under the Judiciary Act of 1925* (1928), 42 Harvard Law Review 1, 23.

Section 4.10

1. Silas A. Harris, *Appellate Courts and Appellate Procedure in Ohio,* p. 11 (1934).

2. Philip Marcus, *Affirmance Without Opinion* (1937), 6 Fordham Law Review 212, 227.

are right. How can they do so otherwise than by writing full, reasoned opinions?"[1]

A reasoned opinion, that writer observes, is needed 'to maintain the reputation of the court and obtain for it the respect which it should have."[2]"

CONCLUSION

For this case and for the future of microsiping and all related ancillary tire services performed at the retail level the writ should issue.

Respectfully submitted,

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Section 4.11

1. *The Number and Length of Judicial Opinions* (1949), 33 Journal of the American Judicature Society 108, 109.

2. *Id.*

APPENDIX

ORDER OF THE DISTRICT COURT DENYING PETITIONER'S MOTION TO COMPEL DISCOVERY

Civil Action No. 1158-71

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA,
Plaintiff,

v.

THE GENERAL TIRE & RUBBER CO.,
Defendant.

ORDER

Upon consideration of defendant's motion for production of documents, defendant's memorandum of points and authorities in support thereof, plaintiff's opposition to defendant's motion, and plaintiff's memorandum of points and authorities in support thereof it is by the Court this 19th day of June, 1972,

ORDERED that the motion be and hereby is denied.

JUDGMENT OF THE DISTRICT COURT

(Filed November 6, 1972)

Civil Action No. 1158-71

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA,
Plaintiff,

v.

THE GENERAL TIRE AND RUBBER CO.,
Defendant.

ORDER

Upon consideration of the motions of the plaintiff and the defendant for summary judgment, the pleadings, discovery, depositions, points and authorities, stipulation and exhibits filed herein, and the Court having determined therefrom that Federal Motor Vehicle Safety Standard 109 is applicable to this case and that the tires in question violated that Standard, and the Court having concluded that there is no genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law, it is by the Court this 6th day of November, 1972,

ORDERED:

1. That the motion of the plaintiff for summary judgment is granted and judgment is entered herein in favor of the plaintiff against the defendant, in the amount of $4,000 plus costs.

2. That the motion of the defendant for summary judgment be, and hereby is denied.

3. That the defendant, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are permanently restrained and enjoined from engaging in further violations of Section 108 (a)(1) of the Act (15 U.S.C. 1397(a)(1)) by manufacturing for sale, selling and introducing and delivering for introduction into interstate commerce micro-siped tires which do not conform to Federal Motor Vehicle Safety Standard No. 109; and of Section 108 (a)(3) of the Act (15 U.S.C. 1397(a)(3)) by manufacturing for sale, selling and introducing and delivering for introduction into interstate commerce micro-siped tires which it certifies conform to all applicable Federal Motor Vehicle Safety Standards, but which do not in fact conform with Federal Motor Vehicle Safety Standard No. 109.

/s/ Joseph C. Waddy
United States District Judge

JUDGMENT OF THE COURT OF APPEALS

(Filed December 14, 1973)

No. 72-2214

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE UNITED STATES OF AMERICA

v.

THE GENERAL TIRE AND RUBBER COMPANY,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: McGOWAN, TAMM and LEVENTHAL,
Circuit Judges

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

ON CONSIDERATION OF THE FOREGOING, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court
/s/ Hugh E. Kline/rb
Clerk